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HAROLD B. WILLEY,

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 859

HARRY SEARS, Trustee, and NEVADA INVESTMENT AND FINANCE CORPORATION, a Corporation,
Appellants,

vs.

COUNTY OF CALAVERAS, STATE OF CALIFORNIA, GEORGE G. BRADDOCK, A. J. GIANELLI, MARVIN L. WATERS, CLAUDE T. SMITH, FRANK A. CRESPI, FRANK LANGFORD and BOARD OF SUPERVISORS OF CALAVERAS COUNTY,
Appellees.

Appeal From the Supreme Court of the State of California

MOTION TO DISMISS

JOSEPH S. HUBERTY
District Attorney
Calaveras County
Court House
San Andreas
California

Attorney for all other Appellees

EDMUND G. BROWN
Attorney General of the State of California

E. G. BENARD
Assistant Attorney General

IRVING H. PERLUSS
Assistant Attorney General

EDWARD P. HOLLINGSHEAD
Deputy Attorney General
Library and Courts Building
Sacramento 14, California

Attorneys for Appellee State of California

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COUNTY OF CALAVERAS, STATE OF CALIFORNIA, GEORGE G. BRADDOCK, A. J. GIANELLI, MARVIN L. WATERS, CLAUDE T. SMITH, FRANK A. CRESPI, FRANK LANGFORD and BOARD OF SUPERVISORS OF CALAVERAS COUNTY,
Appellees.

Appeal From the Supreme Court of the State of California

MOTION TO DISMISS

Appellees above named, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, move to dismiss the appeal in the above entitled case on the grounds: (a) that the federal question sought to be raised by this appeal was neither timely or properly raised, nor expressly passed upon by the court below; and (b) that the appeal does not present a substantial federal question.

STATEMENT OF THE CASE

This case involves a proceeding under the ad valorem property tax law of the State of California [Article XIII, California Constitution; Division 1 (Sections 1 to 5143, inclusive), California Revenue and Taxation Code], whereunder several mining claims formerly owned by the Calaveras Central Mining Corporation were deeded to the State of California for nonpayment of the ad valorem property taxes levied by appellee County of Calaveras for the Fiscal Year 1935-1936. The main purpose of the action was to have it declared that the deed issued to the State of California for delinquent ad valorem taxes for the Fiscal Year 1935-1936 was invalid. The real property consists of patented mining claims on four parcels of land and the minerals underlying another parcel.

The complaint alleged the devolution of title from the Calaveras Central Mining Corporation, the owner of the property on and prior to the first Monday in March, 1935, to its present owners, plaintiff and appellant Sears, as trustee by substitution under the terms of a judgment of the Calaveras County Superior Court and to plaintiff and appellant Nevada Investment and Finance Corporation, which purchased, as trustee, all the placer gold in place in five parcels of property from Sears (Complaint, First Cause of Action, Paragraphs I, III, IV, VI, VIII, Cl. Tr., p. 1, pp. 7-10;

Second Cause of Action, Paragraphs II, III, Cl. Tr., pp. 11-12). It was further alleged that the Assessor of Calaveras County assessed these five parcels of real property separately for the year 1935-36 and that the total ad valorem taxes levied for that year amounted to $750.50. The taxes were not paid and the property was "sold"[1] to the State on June 29, 1936 (Complaint, Paragraph II, Cl. Tr., pp. 6-7). There was no redemption. On July 2, 1943, the County Tax Collector executed and recorded a deed to the State (Complaint, Paragraph V, Cl. Tr., p. 8). It was alleged that the plaintiffs were in the exclusive and undisputed possession of the property during all of the times involved (Complaint, Paragraph VII, Cl. Tr., pp. 9-10).

Plaintiffs and appellants sought the annulment of the tax deed on the ground that the tax proceedings leading up to and including the deed to the State were invalid. Defendants and appellees interposed demurrers (Cl. Tr., pp. 32-36, pp. 37-44) on the grounds that all of the alleged defects were cured by the applicable curative act (Chapter 458, California Statutes

[1] The term "sold" as used herein is a technical term to designate the sale by operation of law and the declaration of the county tax collector which occurs not less than 21 nor more than 28 days after the publication of the delinquent list on or before June 8th of each year following the year for which the taxes were due and which sets in motion the five-year period at the end of which the property is deeded to the State (see Sections 3436, 3511, California Revenue and Taxation Code, which are set out in the Appendix hereto).

1943, page 1993),[2] and that the action was barred by the limitations contained in sections 175 and 3521 of the California Revenue and Taxation Code.

Plaintiffs and appellants asserted that the tax levied against the property exceeded the lawful rate levied generally in the county for 1935-1936; that the purchase price for which the property was sold to the State exceeded the legal amount, and that the separate parcels were improperly sold to the State as a single unit. No claim was made nor was it alleged that the deed was void on its face. Defendants and appellees took the position that none of the alleged defects was jurisdictional in the sense that the Curative Act of 1943, cited above, would not apply, and that the action was barred by the statutes of limitations cited above.

The Supreme Court of California rejected plaintiffs' and appellants' contentions and held that the alleged defects, if any, were cured by the curative act cited and that the statutes of limitation barred the action. A petition for rehearing was also denied by the court.

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[2] While the specification of this ground does not appear in the demurrers proper, the curative acts were cited in the memoranda of points and authorities filed therewith. Appellees also cited the following other curative statutes, passed every two years following the Curative Act of 1943, which are to the same effect: California Statutes of 1945, Chapter 1134, page 2176; California Statutes of 1947, Chapter 605, page 1615; California Statutes of 1949, Chapter 781, page 1508; California Statutes of 1951, Chapter 494, page 1647; California Statutes of 1953, Chapter 978, page 2465. All code sections and statutes individually cited in this motion, with the exception of those cited in this footnote, are set forth in the Appendix hereto.

It is respectfully submitted that the action of the Supreme Court of the State of California was entirely proper, and that the cases cited by appellants at pages 5-6 of the Jurisdictional Statement have no bearing on the determination herein, for the following reasons:

(a) The controversy in those cases was between an owner in possession and a private purchaser or adverse possessor, in which the statute attempted finally and absolutely to divest the owner in possession of his property.

(b) The California Supreme Court has held the tax deed to the State involved herein to be valid.

(c) Even more important, plaintiffs and appellants have not been deprived of the right to redeem the property by the judgment that the tax deed was valid, or at all.

Section 4101, California Revenue and Taxation Code, which is set out in the appendix hereto, provides that tax-deeded property may be redeemed until the right of redemption has been terminated. In this case, no proceedings have been taken to sell the property by public auction sale under Chapter 7, Part 6, Division 1, of the Revenue and Taxation Code, or by sale to another taxing agency under Chapter 8, Part 6, Division 1, of the code, the usual methods of terminating the right of redemption, nor have any other proceedings been taken which would have that effect. Although the plaintiffs and appellants were barred from attacking the validity of the tax deed and all pro-

ceedings prior to its issuance and recordation, they were not and are not now barred from redeeming the property by paying the amount necessary to redeem, i.e., the taxes, penalties and costs prescribed by Section 4102, California Revenue and Taxation Code. (See *Peterson* v. *Johnson,* 39 Cal. 2d 745, at 748, 249 Pac. 2d 17, at 19 (1952).)

I. THE SUGGESTED FEDERAL QUESTION WAS NOT RAISED IN THE COURT OF FIRST INSTANCE AS REQUIRED BY RULE 15(1)(d) OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES OR PASSED UPON BY THE COURTS BELOW

The question whether the Fourteenth Amendment to the Constitution will permit a state court to apply statutes of limitation to the right of a former owner in possession to contest the validity of tax proceedings leading up to and including a tax deed to the State foreclosing tax liens was not raised by appellants in the court of first instance as required by the second sentence of Rule 15(1)(d) of the Revised Rules of the Supreme Court of the United States nor was the question passed upon by any of the courts below. It is a rule of long standing, of course, that the attempt to raise a federal question after judgment comes too late, unless the state court actually entertains the question and decides it. (*Herndon* v. *Georgia,* 295 U. S. 441, 443 (1935), and cases there cited, rehearing denied 296 U. S. 661.)

As indicated at pages 10-11 of appellants' Jurisdictional Statement on file herein and as disclosed by

the record (Complaint, Cl. Tr., pp. 1-31), the question sought to be presented to this Court was not raised at all until appellants filed their opening brief on appeal with the District Court of Appeal, Third Appellate District, State of California, at pages 26-29 thereof. Nowhere in the record on appeal from the court of first instance, the Superior Court of the State of California, in and for the County of Calaveras, is there to be found any reference to the suggested federal question sought to be reviewed, and, in point of fact, said question was not raised in the court of first instance as required by Rule 15(1)(d) of the Revised Rules of the Supreme Court of the United States. It is, of course, well settled that only the constitutional issues raised in the lower courts are before the Supreme Court of the United States on appeal. (*Shelley* v. *Kraemer,* 334 U. S. 1, 8 (1948).)

Moreover, even when raised for the first time in Appellants' Opening Brief on appeal filed with the District Court of Appeal, Third Appellate District, State of California, reference to pages 28-29 thereof reveals that there was only a bare assertion of the suggested federal question without the benefit of any authorities to support the assertion. Appellants did not at that time show any other indication that they were relying on the point and it was not mentioned again until they filed their Petition for Hearing by the Supreme Court of the State of California (pages 24-28 thereof). To give the Supreme Court of the

United States jurisdiction on appeal from a state court, the mere assertion or bare averment of a federal question or of a claim of some constitutional right is not enough, but there must be a real and substantial controversy of the required character which deserves serious attention.

Hamblin v. *Western Land Co.*, 147 U. S. 531 (1893);

U. S. Fidelity & Guaranty Co. v. *State of Oklahoma*, 250 U. S. 111 (1919);

Herndon v. *Georgia*, 295 U. S. 441 (1935), *supra.*

It is respectfully submitted that the principles discussed above are directly applicable to the appeal herein. Appellants did not choose to rely upon their claim of constitutional right in the court of first instance nor did they as much as cite authorities on that question until they filed their Petition for Hearing by the Supreme Court of the State of California. For this reason and the reasons hereinbefore discussed, appellants should not now be heard to assert the unconstitutionality of the statutes in question as herein applied.

II. THERE IS NO SUBSTANTIAL FEDERAL QUESTION PRESENTED BY THIS APPEAL

Although plaintiffs and appellants did not raise their suggested federal question in the court of first instance, for the sake of completeness, we shall briefly discuss the problem. Appellants have attempted to

present their suggested federal question in a form which appears to support their assertion that it is substantial. However, the record discloses that their contentions are erroneous and without merit.

It must first be pointed out that the Supreme Court of the State of California held that the deed to the State was valid and that none of the alleged defects was jurisdictional in the sense that the curative act would not apply.[3]

Appellants' basic arguments, upon which they claim a breach of their constitutional rights, are predicated on an assumption which is false, that is, that the California courts have said that a tax sale and tax deed to the State under the circumstances here presented is void and cannot be cured and that no title passed to the State. The fallacy of appellants' position is that the Supreme Court of the State of California has passed upon the sale and tax deed actually made in this case and has held to the contrary. This being so, it would appear that appellants are asking this court to reverse the California Supreme Court on a point of California law.

[3] The decision of the Supreme Court of the State of California, which is set forth in full in the appendix to appellants' Jurisdictional Statement, stated at 45 Advanced California Reports 545, at 548, 289 Pac. 2d 425, at 426-427 that:

"* * * Here the facts stated as constituting the alleged defects in the deed all occurred prior to the execution and recordation of the deed. None of the alleged defects in the deed were jurisdictional in the sense that the curative act of 1943 (Stats., 1943, page 1993) would not apply; nor is the deed claimed to be void on its face. * * *"

While plaintiffs and appellants have attempted to buttress their position on general constitutional grounds by the cases cited at page 3 of their Jurisdictional Statement, those cases involve the problem of inverse condemnation and are not in point herein. Moreover, this Court has held that the provisions of the California law relating to the foreclosure of tax liens through a tax sale, giving the owner an opportunity to be heard as to the fairness of the original assessment, providing notice with respect to the time and place of sale, and continuing the right to redeem up to the time the State actually entered or sold, do not deprive the owner of his property without due process of law within the meaning of the Fourteenth Amendment to the Constitution of the United States.

Chapman v. *Zobelein*, 237 U. S. 135 (1915).

This is not a case where the statute makes void deeds valid by mere lapse of time nor does it, in effect, convert ownership into a mere right of action to be asserted within a specified period of time regardless of possession by the owner. All that is barred by the statutes of limitation here involved is the procedural remedy granted to plaintiffs and appellants to test the validity of the deed and the proceedings leading up to it.

It is apparent, therefore, that none of the cases cited by appellants at pages 5-6 of their Jurisdictional Statement support their position, for even assuming *arguendo* that a statute which, regardless of possession

by the owner reduces title to real estate to a mere right of action to be asserted within a prescribed period of time constitutes an unconstitutional taking of property without due process of law, the cases so holding are not in point in this proceeding. As hereinbefore pointed out, this is not a controversy between an owner in possession and a third person under a statute divesting ownership without a hearing but is a proceeding by the former owner to contest the validity of tax proceedings against the very agencies that levied the taxes, wherein the plaintiffs and appellants still have the right to redeem the property. Moreover, the tax deed is not void as asserted by appellants but has been held valid by the highest court of the State.

It is therefore apparent that appellants' assertion that the application of the statutes of limitation against them would deprive them of their property without due process of law is erroneous and without merit. Plaintiffs and appellants were not and are not now barred from redeeming the property and whatever the rule may be in a situation where the property has been sold by the State to a third party, thereby terminating the right of redemption, the concept that a statute of limitation does not run against an owner in possession has no application herein. As previously pointed out, under the state law, redemption of real property sold or deeded to the State for delinquent property taxes may be effected until the right is terminated by one of several

alternative methods set forth in the statute. None of these proceedings has been taken and plaintiffs and appellants still have the right to redeem the property.

Accordingly, it is respectfully submitted that there is in point of fact no federal question presented by the record and, further, even assuming for purposes of argument that there is a federal question, it is not substantial. This is so because appellants, like all taxpayers, knew that the property was subject to taxation and that the taxes levied thereon were required to be paid. By virtue of the delinquency in payment of these taxes, proceedings to enforce their collection were commenced and such proceedings have been held to be valid under the laws of the State of California by the highest court of the State.

CONCLUSION

It is respectfully submitted that the appellants present no substantial federal question for the

decision of this Court and that the appeal should be dismissed.

Respectfully submitted,

EDMUND G. BROWN
Attorney General of the State of California

E. G. BENARD
Assistant Attorney General

IRVING H. PERLUSS
Assistant Attorney General

EDWARD P. HOLLINGSHEAD
Deputy Attorney General
Attorneys for Appellee State of California

JOSEPH S. HUBERTY, District Attorney,
Calaveras County
Attorney for all other Appellees

Appendix

Explanatory Note: Many of the present provisions of the California Revenue and Taxation Code were formerly contained in the California Political Code, which provisions were codified as Division 1 of the Revenue and Taxation Code by California Statutes of 1939, Chapter 154, effective February 1, 1941. The sections of the Revenue and Taxation Code set forth in this appendix are those which were in effect during the pendency of the present litigation. Wherever the provisions applicable to the case at bar were different at the time the particular step prescribed in the statute was taken, the provision then applicable will be set forth parenthetically, so far as pertinent to the discussion herein.

California Revenue and Taxation Code, Section 175:

"All deeds heretofore and hereafter issued to the State of California or to any taxing agency, including taxing agencies which have their own system for the levying and collection of taxes, by reason of delinquency of property taxes or assessments levied by any taxing agency or revenue district, shall be conclusively presumed to be valid unless held to be invalid in an appropriate proceeding in a court of competent jurisdiction to determine the validity of said deed commenced within one year after the execution of said deed, or within one year after the effective date of this section, whichever be later. Such proceedings may be prosecuted within the time limits above specified in the manner and subject to the provisions of Sections 3618 to 3636 of this code." (Added by California Statutes of 1945, Chapter 1017, section 1, page 1963, in effect September 15, 1945.)

California Revenue and Taxation Code, Section 3436:

"Not less than 21 nor more than 28 days after the first publication of the published delinquent list, at the time fixed in the publication, the real property on which the taxes, assessments, penalties, and costs have not been fully paid, except tax-sold property and possessory interests, shall by operation of law and the declaration of the tax collector be sold to the State. The sale shall be in the tax collector's office." (Enacted by California Statutes of 1939, Chapter 154, page 1324, effective February 1, 1941; based on former California Political Code, Section 3767, and portions of former section 3771, Political Code.) Section 3767 of the Political Code, in effect on June 29, 1936, the date the subject property was sold to the State, provided: "The publication must designate the day and hour when the property will, by operation of law, be sold to the state, which sale must not be less than twenty-one nor more than twenty-eight days from the time of the first publication, and the place shall be in the tax collector's office."

The pertinent portions of Section 3771, Political Code, as they existed on June 29, 1936, which were later codified into Section 3436, Revenue and Taxation Code, read as follows:

"On the day and hour fixed for the sale in the delinquent tax list, all property upon which the taxes and assessments of all kinds, penalties and interest have not been fully paid, except as provided in section 3814 of this code, shall by operation of law and the declaration of the tax collector, be sold to the State, * * *."

California Revenue and Taxation Code, Section 3511:

"Not less than 21 days nor more than 35 days after the first publication of the notice of deeding of tax-sold property and at least five years after the property was sold to the State, the tax collector shall, without charge, execute a deed in duplicate conveying the property to the State. The county clerk shall take acknowledgment of the deed without charge." (Enacted by California Statutes of 1939, Chapter 154, page 1326, effective February 1, 1941; amended by Statutes of 1939, Chapter 877, page 2469, effective February 1, 1941; Statutes of 1949, Chapter 243, page 468; Statutes of 1951, Chapter 598, page 1761.) The section as it existed on July 2, 1943, the date of the deed to the State, was as follows: "If the sale of any tax-sold property at public auction is not completed, the tax collector shall, without charge, forthwith execute a deed in duplicate conveying the property to the State. The county clerk shall take acknowledgment of the deed without charge." While the provisions of this section were then different, they tied in with the provisions of former Section 3476 of the Revenue and Taxation Code, enacted by Statutes of 1939, Chapter 154, page 1325, which provided as of July 2, 1943, that: "Not less than 21 nor more than 28 days after the first publication of the notice of sale of tax-sold property and at least five years after the property was sold to the State, the tax collector shall, as prescribed in this chapter, sell at public auction to the highest bidder for cash in lawful money of the United States all tax-sold property which was sold to the State in the fifth preceding calendar year, or any year before that, except that all property sold

by the State for which the full purchase price has not been paid shall be deeded to the State.

> "The sale shall begin at the time given in the published notice of sale and shall continue from day to day thereafter if additional time is needed to complete the sale. The sale shall be in the tax collector's office."

In 1943, the Legislature enacted legislation (California Statutes of 1943, Chapter 362, page 1598, effective May 8, 1943) suspending sales at public auction during 1943 and 1944. These were sections 3490 and 3491, California Revenue and Taxation Code, which provided, as of July 2, 1943, that:

"3490. Notwithstanding the provisions of Section 3476 of this code no sale at auction to the public shall be made of tax-sold property in the years of 1943 and 1944."

"3491. At the day and hour fixed in Section 3476 of this code the property subject to sale to the public shall be deeded to the State as provided in Section 3511 of this code."

By virtue of these sections, the property involved in this action was deeded to the State on July 2, 1943, and has ever since remained in state ownership under the tax deed.

California Revenue and Taxation Code, Section 3521:

"A proceeding based on an alleged invalidity or irregularity of any deed to the State for taxes or of any proceedings leading up to the deed can only be commenced within one year after the date of recording of the deed to the State in the county recorder's office or within one year after June 1, 1941, whichever is later.

"Sections 351 to 358, inclusive, of the Code of Civil Procedure do not apply to the time within which a proceeding may be brought under the provisions of this section." (Added by California Statutes of 1941, Chapter 290, page 1426, effective May 19, 1941, operative June 1, 1941.)

California Revenue and Taxation Code, Section 4101:

"Tax-sold property and, if the right of redemption has not been terminated, tax-deeded property may be redeemed by the redemptioner until the right of redemption is terminated. The 'redemptioner' is the person whose estate has been sold or his successor in interest." (Added by California Statutes of 1941, Chapter 290, page 1430, effective May 19, 1941, operative June 1, 1941.)

California Revenue and Taxation Code, Section 4102:

"The amount necessary to redeem shall be paid in lawful money of the United States and is the sum of the following:

"(a) The amount of sold taxes.

"(b) The delinquent penalties and costs which were a lien on the property at the time of the sale to the State.

"(c) Redemption penalties.

"(d) A redemption fee of one dollar and fifty cents ($1.50) on each separately valued parcel sold to the State subsequent to June 13, 1947."

(Enacted by California Statutes of 1939, Chapter 154, page 1345, as amended by Statutes of 1955, Chapter 255, page 717.)

California Statutes of 1943, Chapter 458, page 1993 (Curative Act, 1943), effective August 4, 1943:

"An act to validate certain acts of counties, cities and counties and of their officers relating to taxation of property.

"The people of the State of California do enact as follows:

"SECTION 1. Every act and proceeding heretofore taken by any county, city and county or the officers thereof relative to the preparation, transmitting, computing, determining or fixing the budget or the tax rate or rates of any county or city and county, or to the assessment or equalization of property or to the levy of taxes thereon or to tax sales or certificates of tax sales, tax deeds or other conveyances resulting from such assessment, equalization and levy, are hereby confirmed, validated and declared legally effective.

"SEC. 2. (a) This act is limited to the correction of defects, irregularities and ministerial errors which the Legislature originally could have omitted from the statutory requirements of law under which the acts hereby confirmed, validated and declared legally effective were taken.

"(b) This act is limited to the validation of acts and proceedings to the extent to which the same can be effectuated under the State and Federal Constitutions.

"SEC. 3. If any provision of this act or its application to any person or circumstances is held invalid, the remainder of the act and the application of its provisions to other persons or circumstances is not affected."

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